FIDELIS DANIEL ENECHUKWU v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
[CRIMINAL APPEAL NO: P-05-13-01-2013]
25 MARCH 2015

CRIMINAL PROCEDURE: *Interpreter – Duty of court – Accused was Nigerian – Request for Nigerian interpreter refused by trial judge – Charge and opening speech read and interpreted to accused by court interpreter – Testimony of prosecution witnesses in Malay language not translated – Whether accused deprived of fundamental right to fair trial – Criminal Procedure Code, s. 270*

The appellant was convicted and sentenced to death by the High Court for the offence of trafficking in dangerous drugs. The appellant appealed against the conviction and sentence. The only issue raised for the appellant, a Nigerian, was the failure of the trial court to provide an interpreter for the appellant. The appellant's request for a Nigerian interpreter, after several prosecution witnesses testified, was refused by the trial judge. Hence, the appellant submitted that he was deprived of his fundamental right to a fair trial and urged the matter be remitted for retrial. However, the prosecution contended that no miscarriage of justice was occasioned to the appellant as the appellant understood English.

Held (allowing appeal; remitting case to High Court for retrial)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The court interpreter had translated the charge and the opening speech to the appellant in English. However, not all the evidence of the prosecution witnesses, who had testified in Malay language, was translated to the appellant. Therefore, the court doubted whether the appellant actually understood the proceedings and of what the witnesses were testifying against him. In this regard, it was found that the provisions of s. 270 of the Criminal Procedure Code had been breached. (para 13)

(2) The assistance of the interpreter was sought but was refused by the trial court. The concern of the trial judge, that the services of the Nigerian interpreter would have to be paid for by the court, was an irrelevant consideration. In the circumstances, the appellant had been deprived of a fair trial when the evidence of the witnesses was not translated to him. (paras 12, 14 & 15)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi bagi kesalahan mengedar dadah berbahaya. Perayu merayu terhadap sabitan dan hukuman tersebut. Satu-satunya isu yang dibangkitkan bagi perayu, seorang warganegara Nigeria, adalah kegagalan mahkamah bicara memperuntukkan
B jurubahasa kepada perayu. Permintaan perayu untuk jurubahasa Nigeria, selepas beberapa saksi pendakwaan memberikan keterangan, dinafikan oleh hakim bicara. Oleh itu, perayu menghujahkan bahawa dia dinafikan hak asasi untuk perbicaraan adil dan mendesak agar perkara tersebut dikembalikan untuk dibicarakan semula. Walau bagaimanapun, pihak pendakwaan
C menghujahkan bahawa tiada ketidakadilan berlaku kepada perayu kerana perayu memahami Bahasa Inggeris.

Diputuskan (membenarkan rayuan; mengembalikan semula kes kepada Mahkamah Tinggi untuk perbicaraan semula)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman
D **mahkamah:**

(1) Jurubahasa mahkamah telah menterjemahkan pertuduhan dan ucapan pembukaan kepada perayu ke dalam Bahasa Inggeris. Walau bagaimanapun, bukan semua keterangan saksi pihak pendakwaan, yang
E memberikan keterangan dalam Bahasa Melayu, diterjemahkan kepada perayu. Oleh itu, mahkamah meragui sama ada perayu sebenarnya memahami prosiding dan apa yang dinyatakan oleh saksi-saksi terhadapnya. Berkaitan ini, didapati bahawa peruntukan-peruntukan s. 270 Kanun Tatacara Jenayah telah dilanggar.

F **(2)** Bantuan jurubahasa dipohon tetapi telah ditolak oleh mahkamah bicara. Pertimbangan hakim bicara, bahawa perkhidmatan jurubahasa Nigeria perlu dibayar oleh mahkamah, adalah pertimbangan yang tidak relevan. Dalam keadaan tersebut, perayu telah dinafikan perbicaraan adil apabila keterangan saksi-saksi tidak diterjemahkan kepadanya.

G **Case(s) referred to:**
Ah Poon & Ors v. PP [2006] 5 CLJ 521 HC ***(refd)***
Chitra Devi Suppiah v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2011] 3 CLJ 557 HC ***(refd)***
Mat Repin Mamat v. PP [1994] 1 SLR (R) 175 ***(refd)***
R v. Lee Kun (1915) 11 Cr App R 293 ***(refd)***

H **Legislation referred to:**
Criminal Procedure Code, s. 270

For the appellant - Naran Singh; M/s Naran Singh & Co
For the respondent - Tetralina Ahmed Fauzi; DPP

I *[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-12-04-2012]*

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] The appellant was convicted and sentenced to death by the High Court at Penang for the offence of trafficking in dangerous drugs. Against the conviction and sentence, the appellant appealed to the Court of Appeal.

[2] There was only one ground of appeal canvassed before us, namely the failure of the trial court to provide an interpreter to the appellant.

[3] The appellant is a Nigerian. During the trial in the High Court, the appellant was represented by learned counsel, Mr Yagoo Subramaniam. After several prosecution witnesses testified, the defence counsel made a request that a Nigerian interpreter be provided to the appellant. The trial judge refused, as can be seen from the following (rekod rayuan jld 1: p. 71):

P/B : I humbly request to this Court to provide an Interpreter to the accused.

Mahkamah : No, he can understand English.

P/B : It's better for him.

Mahkamah : Mr. Fidelis, where were you schooling and until what level?

OKT : At Nigeria. Secondary School.

Mahkamah : At Nigeria, all the Secondary School leavers are able to speak English, isn't it?

OKT : Yes.

P/B : It's better to appoint an Interpreter for him.

Mahkamah : No, cannot. He can understand English. At the same time the Court interpreter will translate the evidence to him in English.

[4] Citing *Mat Repin bin Mamat v. PP* [1994] 1 SLR (R) 175; *Ah Poon & Ors v. PP* [2006] 5 CLJ 521 and *Chitra Devi Suppiah v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2011] 3 CLJ 557, learned counsel submitted that the appellant was deprived of his fundamental right of a fair trial and urged that the matter be remitted for retrial.

[5] For the prosecution, learned Deputy Public Prosecutor submitted that there was no miscarriage of justice occasioned to the appellant as the appellant understood English. It was submitted by learned Deputy that under s. 270 of the Criminal Procedure Code ('CPC'), there was no necessity to provide an interpreter of the mother tongue of the appellant. In submitting that the appellant understood the English language, learned Deputy highlighted that:

(i) when the charge was read, the appellant understood the charge and elected to plead not guilty;

(ii) the court interpreter translated the proceedings to the appellant;

(iii) the appellant stated that he could speak English; and

(iv) the appellant in fact gave evidence in English.

[6] It was contended by learned Deputy that the appellant was not prejudiced as learned counsel could communicate and obtain instructions from the appellant and learned counsel was able to forward the defence at the early stage of the trial.

[7] We had allowed the appeal and ordered a retrial. We now provide the reasons for so deciding.

Our Decision

[8] We were concerned with whether the evidence given by the prosecution witnesses in the Malay language was interpreted to the appellant as required by s. 270 of the CPC which provides:

> 270. Interpretation of evidence to accused
>
> (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

[9] In *Mat Repin* (*supra*), the appellant was convicted in the High Court for importing into Singapore not less than 1.026g of cannabis. The appellant hailed from Kelantan and could only speak and understand the Kelantanese dialect. Although a suitably qualified interpreter in the Kelantanese dialect was eventually provided for the appellant after ten witnesses had given evidence, the Singapore Court of Appeal upheld the conviction of the appellant. M Karthigesu JA said:

> 13. Section 209 and other provisions in the CPC as to interpreters are statutory safeguards to ensure that an accused is substantially able to comprehend the proceedings to enable him to best present his defence. The ability to understand the prosecution case against him will allow him to decide whether to give evidence himself, whether to call witnesses on his behalf or whether to instruct his counsel to rebut any particular piece of evidence given by the Prosecution.
>
> 14. However, to that a caveat must be added. Notwithstanding that there has been non-compliance with s. 209(1) or any provision requiring the accused's comprehension of the proceedings, an appellate court will only interfere if the accused has been prejudiced such that there has been a failure of justice. ...
>
> 15. One such failure of justice was occasioned in the recent Privy Council decision of *Radhakrishnan Kunnath v. The State* [1993] 1 WLR 1315. ...
>
> 16. The facts there were that Kunnath, an uneducated Indian peasant, was charged with drug trafficking. He claimed trial, and at his trial, which was conducted in English, he was represented by experienced counsel and

an interpreter had translated the charges to Kunnath as well as his statement from the dock. The interpreter, however did not translate the evidence of the witnesses to Kunnath who stated that he had not understood what any of the witnesses had said. He was convicted and sentenced to death. His appeal to the Court of Criminal Appeal of Mauritius was dismissed as that court was of the view that, since neither Kunnath nor his counsel had demanded the right to a translation of the evidence, that right was "lost for all time". Kunnath appealed to the Privy Council.

17. Lord Jauncey, in delivering the judgment of the Board, held that it was an essential principle of criminal law that a trial for an indictable offence should be conducted in the presence of the accused and this meant not simply that there should be corporeal presence of the accused but that the accused, by reason of his presence should be able to understand the proceedings and decide what witnesses he wished to call, whether to give evidence, and if so, upon what matters. Since Kunnath had not understood the evidence, the trial was for all practical purposes conducted without his presence and he had been deprived of a fair trial. The Board accordingly quashed his conviction.

18. It is therefore the court's duty to ensure that the accused is able to substantially understand the evidence given in the proceedings. The right to an interpreter cannot be waived by an accused or his counsel or his counsel. ...

[10] Whilst agreeing with the proposition of the law set out in *Kunnath*'s case (*supra*), the Singapore Court of Appeal found that *Kunnath*'s case was at the extreme end of the spectrum. The Singapore Court sustained the conviction in *Mat Repin* (*supra*) on the grounds there was nothing to suggest that the appellant had, in any way, been prejudiced by only partially understanding the witnesses who took the stand without the Kelantanese interpreter as those witnesses were formal witnesses whose evidence could not have merited any serious challenge by the accused through his counsel. The real contentious evidence was the evidence of Ms Helena Granroth of the Department of Scientific Services on the analysis of the plant material and in respect of her evidence, the court found:

22. ... we do not see how the appellant has been prejudiced by not understanding the evidence of the procedure she adopted as even a layman who could understand English would not have been any better equipped to challenge the intricacies of scientific procedures. In our view, there was nothing that the appellant could have added to his counsel's robust challenge of the scientific procedure, assuming that he had actually understood what Ms Granroth was saying. The real contentious evidence in the present case was the evidence of HCO Png and, especially, that of CO Lim, who alleged that the appellant had made certain incriminating confessions to them. By that time, however, the services of the Kelantanese interpreter had already been secured and the appellant was able to understand what was being said.

[11] With respect, we were inclined to follow the decision in *Kunnath*'s case (*supra*). As stated by the Lord Chief Justice of England in *R v. Lee Kun* (1915) 11 Cr App R 293; [1914-1915] All ER Rep 603 which was quoted in *Mat Repin* (*supra*):

> If [the accused] does not understand the English language, he cannot waive compliance with the rule that evidence must be translated; he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It is for the court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure.

[12] It must be emphasised that in the instant appeal, the assistance of the interpreter was sought, but was refused by the court.

[13] At the hearing of the appeal, we had the opportunity of viewing the recording of the proceedings (the CRT) in the High Court. We noted that the court interpreter had translated the charge and the opening speech to the appellant in English. However, we found that not all the evidence of the prosecution witnesses, who had testified in Malay language were translated to the appellant. We therefore had a doubt whether the appellant actually understood the proceedings and of what the witnesses were testifying against him. In this regard, we found that the provisions of s. 270 of the CPC had been breached.

[14] We also found from the CRT that the learned trial judge was concerned that the services of the Nigerian interpreter will have to be paid for by the court. In our view, that was an irrelevant consideration.

[15] Further, we took note of the fact that in *Kunnath* (*supra*), the appellant was represented by an experienced counsel, yet the Privy Council quashed the conviction on the ground that the appellant had been deprived of a fair trial when the evidence of the witnesses was not translated to him. In our view, the appellant in the instant appeal had similarly been deprived of a fair trial.

[16] Based on all the above, we were unanimous in our decision that in the interest of justice and fair trial, the appeal be allowed and the case be remitted to the High Court for retrial. We ordered accordingly.